Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Regarding Carrier Current Systems, including Broadband over Power Line Systems	)	ET Docket No. 03-104
	)	
	)	

JOINT CABLE OPERATOR COMMENTS

The Cable Television Association of Georgia, South Carolina Cable Television Association, Charter Communications, Ohio Cable Telecommunications Association, Texas Cable & Telecommunications Association, and Florida Cable Telecommunications Association, Inc. ("Joint Commenters"), by their attorneys, respectfully submit the following comments in response to the Federal Communications Commission's ("FCC" or "Commission") *Notice of Inquiry*[1] published in the Federal Register on May 23, 2003.[2] These comments address Joint Commenters' concerns that certain unreasonable electric utility pole access and inspection practices may escalate as some electric utilities pursue a business that competes directly with cable operators' and competitive local exchange carriers' ("CLECs") broadband service offerings. Should access broadband over power line ("Access BPL")[3] applications progress beyond the mere trial stage, it may be necessary for the Commission to make specific modifications (through rulemaking proceedings or otherwise) to its non-rate access and cost allocation precedent.

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[1] *In re Inquiry Regarding Carrier Current Systems, including Broadband over Power Line Systems*, Notice of Inquiry, ET Docket No. 03-104 (Apr. 28, 2003) ("*Notice of Inquiry*").

[2] 68 Fed. Reg. 28,182 (May 23, 2003).

[3] Access BPL systems are types of carrier current systems that operate on an unlicensed basis under Part 15 of the Commission's rules and utilize existing electrical power lines as their own transmission medium to provide high-speed communications capabilities by coupling RF energy onto the power line. *Notice of Inquiry*, ¶ 3.

I. The Commission Must Ensure That Electric Utilities Deploying BPL Do Not Use Their Control Over Poles In An Anti-Competitive Manner

The Commission has signaled its concern not only with the technical issues regarding Access BPL, but also with the policy implications for electric utilities deploying broadband services as they affect pole attachments generally.[4] Access to electric utility-owned poles and conduits is a crucial part of cable operators' businesses. Tensions between utilities and communications attachers concerning terms of pole access, particularly with respect to surveys or new plant and overlashed installations, already has required significant litigation before this Commission and elsewhere.[5] Cable operators attempting to attach to electric utility-owned poles recently have experienced an increase in delayed access to poles, the assessment of excessive pole attachment rental rates, the imposition of inspections and pole loading studies, and formal permit requirements for overlashing – all of which contravene explicit case precedent and FCC rules. These actions delay fiber network deployments and make them significantly more expensive. Joint Commenters are concerned that even the prospect of Access BPL systems may

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[4] *See Notice of Inquiry*, ¶¶ 19, 30; Separate Statement of Commissioner Michael J. Copps (specifically soliciting comment concerning the policy ramifications that BPL may have on pole attachment issues).

[5] *See, e.g., Fiber Technologies Networks, L.L.C. v. Duquesne Light Co.*, File No. EB-03-MD-005 (complaint filed Apr. 8, 2003) (challenging, *inter alia*, electric utility's requirement that CLEC pay for comprehensive pole inventory and analysis, including digital photographs, entered into database); *Adelphia Business Solutions of Pennsylvania, Inc. v. Duquesne Light Company*, File No. PA 01-004 (complaint filed Sept. 17, 2001) (protesting electric utility's discrimination in favor of its own communications affiliate by not requiring the same pole loading studies and profiles required of third party CLEC) (proceeding terminated); *Charter Communications, Inc .v. Union Electric d/b/a AmerenUE*, File No. PA 01-001 (complaint filed Jan. 11, 2001) (challenging utility's unreasonable and unlawful restrictions on the deployment of overlashed fiber-optic facilities, including unreasonable plant inventory requirements) (proceeding terminated); *Marcus Cable Assoc., L.P. v. Texas Utilities Electric Co*., 12 FCC Rcd. 10362, ¶ 27 (1997) (rejecting as "anti-competitive" electric utility's demand for detailed information concerning third parties and location on network of sub-lessees).

Electric utilities have also waged a comprehensive effort to dismantle pole attachment regulation under 47 U.S.C. § 224 and the Commission's implementing rules. *See, e.g.*, *National Cable Telecommunications Association v. Gulf Power Co*., 534 U.S. 327 (2002); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); *Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002); *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002); *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002).

lead to an escalation of these practices as utilities' competitive neutrality with regard to third-party pole use is reduced.

In order to design and deploy a BPL network across the distribution grid, electric utilities require detailed information about that grid, including the locations of capacitor banks, mechanical switch locations, and, perhaps most important, transformer locations. Pole owners increasingly are requiring attachers to supply detailed plant information, digital mapping data and digital photos essential to the utilities' design and development of their own Access BPL networks that may compete directly with cable operators' and CLECs' broadband offerings. Specifically, some electric utilities have attempted to require cable operators and others to pay excessive up-front, per-pole charges when cable operators seek to overlash fiber-optic cables, in addition to applying for permits for new "hard-line" attachment permits. Some utilities do so despite unambiguous Commission pronouncements that utilities must closely tailor inspection costs to only those functions necessary to accommodate a new "hard-line" cable attachment,[6] and that new permits (and thus inspections) may not be required for overlashing.[7]

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[6] *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, 15 FCC Rcd. 9563, ¶ 23 (2000) (noting that utility may not burden attacher with costs of engineering studies identifying pole attachments of all parties on pole), *vacated by settlement* 2002 FCC LEXIS 6385 (2002) (in issuing the vacatur, the Commission specifically stated that its decision did not "reflect any disagreement with or reconsideration of any of the findings or conclusions contained in" *Cavalier Tel. LLC v. Virginia Elec. & Power Co.*); *Texas Cable & Telecomm. Ass'n v. Entergy Services, Inc.*, 14 FCC Rcd. 9138, ¶ 10 (1999) (rejecting utility attempt to recover engineering survey fee as unjust and unreasonable, where not based on actual costs of engineering for attachments); *Texas Cable & Telecomm. Ass'n v. GTE Southwest, Inc.*, 14 FCC Rcd. 2975, ¶ 33 (1999) (same); *Newport News Cablevision, Ltd. Communications Inc. v. Virginia Elec. & Power Co.*, 7 FCC Rcd. 2610, ¶ 8 (1992) ("costs incurred in regard to poles and their attachments which result in a benefit should be borne by the beneficiary"). *See also Cable Texas, Inc. v. Entergy Services, Inc.*, 14 FCC Rcd. 6647, ¶ 13 (1999) (observing that cable operator attachers are responsible for costs of inspection if only cable attachments are inspected and no benefit accrues to the utility).

[7] *See, e.g., In re Amendment of the Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103, ¶ 75 (2001), *aff'd sub nom. Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002); *In re Heritage Cablevision Associates of Dallas v. Texas Utilities Electric Co.*, 8 FCC Rcd. 373 (1993); *Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electrical Co.*, 6 FCC Rcd. 7099 (1991), *recon. dismissed*, 7 FCC Rcd. 4192 (1992), *aff'd sub nom. Texas Utilities Electrical Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

A common pattern is for a utility to require an operator to pay for the survey of an entire pole and all the facilities (not just its own) placed on that pole. Rather than inspect (and if necessary, measure) the facilities immediately adjacent to where a new attachment will be placed or a new conductor will be overlashed, utilities often mandate that cable operators conduct detailed surveys, inventories and load studies of ***all*** facilities on the pole, including electrical facilities, and conduct a detailed loading study for every pole.[8] The details of each facility obtained from these surveys, inventories and studies (*e.g.,* size, weight, character, class, model, etc.) are then captured in a software application / database for the utility's use. Thus, the utility would be in a position to collect—in digital form—not only the data regarding its own plant, but also competitively sensitive data (including specific fiber-strand count) for all telephone and cable plant mounted on each pole. The utility then could use this information to design its competitive Access BPL system.[9] Joint Commenters are particularly concerned that the utility would receive a double benefit by requiring its pole licensees to pay for engineering surveys that are not required for the licensees' attachments, but *would be* necessary to design an Access BPL system to compete directly with attachers' systems. In other words, to the extent that cable operators are required to pay for survey functions that could be used in Access BPL design, such a result would clearly violate Commission pole attachment precedent.[10]

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[8] *See, e.g., Fiber Technologies Networks, L.L.C. v. Duquesne Light Co.*, File No. EB-03-MD-005, Complaint at 20-21 (filed Apr. 8, 2003) and Reply at 16-18 (filed May 28, 2003); *Adelphia Business Solutions of Pennsylvania, Inc. v. Duquesne Light Company*, File No. PA 01-004, Reply at 16 (filed Nov. 6, 2001) (proceeding terminated); *Charter Communications, Inc .v. Union Electric d/b/a AmerenUE*, File No. PA 01-001, Reply at 5-19 (filed Mar. 5, 2001) (proceeding terminated).

[9] Field reports indicate that utilities even use the mandatory pole loading profiles to completely replace existing poles with taller ones, at the utilities' sole discretion, thereby enhancing their distribution pole network for competitive BPL systems.

[10] Mandatory pole loading surveys are often conducted by third party engineering contractors and, because electric utilities pass these costs directly to attachers, there appears to be little concern by utilities' and their contractors with keeping costs low, which violates Commission precedent. *See, e.g., Cable Texas, Inc. v. Entergy Servs., Inc.,* 14 FCC Rcd. 6657, ¶ 14 (1999). Indeed, the charges assessed on attachers quickly add up, as they include such

On occasion, cable operators and electric utilities have succeeded in negotiating mutually acceptable resolutions—sometimes after litigation before this Commission and other tribunals—to these kinds of inspection and permitting disputes. Many times, however, inspections and permitting remain points of contention. Electric utilities such as American Electric Power Company, Inc. ("AEP"), Ameren Corporation, Consolidated Edison, Inc., Pepco (which also owns Conectiv), TXU/Oncor (Texas Utilities) and Southern Company are actively exploring the deployment of Access BPL.[11] Notably, and perhaps not coincidentally, cable operators have experienced unreasonably burdensome pole inspection and survey issues with many of these same utilities.

CONCLUSION

The Commission's interest in facilitating the widest possibly array of communications technologies and services is well known. Nonetheless, the Commission must prevent pole owners who have the opportunity, and with BPL, the motive, from using their control over poles to harm their cable competitors as they deploy and market competitive services. Such utility actions would endanger Congress's goal of ensuring access to poles on just and reasonable rates, terms, and conditions.[12] Accordingly, the Commission should (1) carefully monitor utilities'

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items as hourly rates for project managers, quality inspectors, and other managers, as well as additional charges for engineering costs, clerical work, use of digital cameras, meals *per diem*, mileage, and other equipment charges. Attachers pay these assessments in addition to separate charges for pre-inspections, progress inspections, and post-inspections associated with any upgrades or overlashing of the attacher's communications facilities on the poles.

[11] *See, e.g.,* Paul Davidson, *High-Speed Net Service: Coming To A Plug Near You?*, USA Today, Apr. 14, 2003 at 1B. BPL deployment is not limited to investor-owned utilities. BPL has attracted significant interest from numerous rural electric cooperatives and municipally-owned utilities, including the Coweta-Fayette Electric Membership Corporation, the Los Angeles Department of Water and Power, and the City of Manassas, Virginia. Although these entities are not directly subject to the Commission's jurisdiction under 47 U.S.C. § 224, competition from these types of largely unregulated entities is increasing, and any action by the Commission addressing investor-owned electric utilities' BPL efforts will likely influence municipal and cooperative utilities' BPL implementation plans and pole attachment practices.

[12] *See* 47 U.S.C. § 224(b)(1).

engineering, pole loading, and audit requirements as applied to third party attachers to prevent any increase in anti-competitive actions by those utilities deploying Access BPL systems, and (2) be prepared to supplement existing non-rate access and cost allocation precedent to the extent Access BPL systems progress through the trial stage.

Respectfully submitted,

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